



**Wafula v Republic (Miscellaneous Criminal Application
E002 of 2023) [2024] KEHC 7684 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CRIMINAL APPLICATION E002 OF 2023**

DO OGEMBO, J

JUNE 20, 2024

BETWEEN

JAMES WAFULA APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The applicant herein, James Wafula has moved this court by way of a Notice of Motion application dated 6/1/2023. The application seeks basically two prayers:-
 - i. That the period spent in custody by the applicant prior to being sentenced be taken into account.
 - ii. That this court may order that the two years and 5 months imprisonment imposed on the applicant to commence from the date of arrest ie. 14/4/2018.
2. On the body of the application, it is indicated that the same is brought under Section 333 (2) of the *Criminal Procedure Code*. And in the submissions filed, the applicant relies on the case of *Ahmed Abulfadhi Mohamed & Ano v R*, [2018] eKLR.
3. The prosecution opposes the application of the applicant on ground that the trial magistrate considered such period spent in custody and that the sentence meted out of seven (7) years imprisonment was less than as prescribed in law. That the same is unlawful and court ought to enhance same to 10 years imprisonment.
4. I have considered this application and the submissions made by the two sides to it. I have also perused the record of proceedings of the trial court. from the record of the proceedings, the applicant was charged with the offence of Rape contrary to Section 3 (1) (a) (b) (3) of the *Sexual Offences Act*, No. 3 of 2006. He was first arraigned before the trial court on 26/4/2018. Upon entering a plea of not guilty,



the case of the applicant proceeded to hearing. He was eventually convicted of the offence as charged and on 28/9/2021, was sentenced to serve seven (7) years imprisonment.

Section 333 (2) of the *Criminal Procedure Code*, at its proviso states:

“Provided that where the person sentenced under sub section (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”

5. The issue is therefore whether in sentencing the applicant, the trial court took into account the period he spent in remand custody awaiting determination of his trial. To this end, I have considered the sentence proceedings of the trial court of 28/9/2021. In the same. The court noted;

“Considers mitigation. However, accused to serve seven (7) years custodial sentence. Court takes consideration that accused has been in custody since 2018. Right of appeal 14 days.”

6. The trial court therefore took into account the period the applicant spent in custody awaiting the determination of his trial. And this obviously formed the opinion of the court in meting out a sentence of seven (7) years imprisonment as opposed to the statutory minimum sentence of 10 years imprisonment for the offence.

7. This application of the applicant brought under Section 333 (2) of the *Criminal Procedure Code* lacks any merit. Same is wholly dismissed.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE, 2024.

D. O. OGEMBO

JUDGE

20/6/2024

Court

Ruling read out in open court in presence of the applicant (Kisumu) and Ms. Challa for State.

D. O. OGEMBO

JUDGE

20/6/2024

